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No. 85-27

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LOS ANGELES UNIFIED SCHOOL DISTRICT; BOARD OF EDUCATION OF THE CITY OF LOS ANGELES; And HARRY HANDLER, SUPERINTENDENT, In His Official Capacity

Petitionersand Cross-Respondents,

vs.

LOS ANGELES BRANCH NAACP, BEVERLY HILLS-HOLLYWOOD NAACP; SAN PEDRO-WILMINGTON NAACP; WATTS NAACP;SAN FERNANDO VALLEY NAACP; And CARSON NAACP,

Respondents and Cross-Petitioners.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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RESPONDENTS NAACP'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS NAACP'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR OPPOSING CERTIORARI

I

Preliminary Statement

Like the partially dissenting opinion of four members of the court below, expressed through Judge Sneed, the Petition For Certiorari erroneously seeks the extension of the preclusive effects of res judicata to include any alleged segregative acts occurring prior to entry

of the close of remedial proceedings by the Los Angeles Superior Court in **Crawford**, i.e., September 10, 1981. 1/

1/ Judge Sneed's partial dissent is based, prima facie, on his consistent belief that California Proposition I "explicitly put all alleged segregative acts at issue in the state court proceedings" (750 F.2d at p. 746); that the Los Angeles Board's application was a "supplemental pleading that put at issue the question of whether any acts of de jure segregation occurred up until the final disposition of that motion" and was "an invitation for the plaintiffs to come forward with whatever evidence existed of de jure segregation in the decade since the original trial" (750 F.2d at p. 747); and, that the **Crawford** plaintiffs, thereafter, unilaterally declined the invitation, thereby forever waiving any right to litigate any federal issues, including those new issues, in any other forum. (750 F.2d at p. 748)

Claiming support under California claim preclusion law, Judge Sneed opines that "because of both the unique character of school desegregation cases in general and the special circumstances of this case, the date of judgment, for the purpose of applying the **Eichman** rule [preclusion to the time of judgment, rather than time of complaint], must be the date of the state court's final order in 1981." (750 F.2d at p. 748)

Differing from the minority opinion below, however, the Petitioners assert not solely that the **Crawford** plaintiffs had the **opportunity** to litigate post-1969 de jure liability claims, but that they **actually litigated**, repeatedly, such claims, and once having done so, they were required by state preclusion rules to be barred from litigating **those** two claims or **any other** claims occurring prior to September 10, 1981. (Brief, p. 7) 2/

In support of this all or nothing rule, petitioners cite **Allen v. McCurry**,

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2/ The only such claims specifically indicated, by way of example, are: 1) "the District's construction of bungalows on overcrowded minority schools. . . .[conduct said to have occurred in 1976, 1977 and 1978]" (Brief, p.7) and, 2) "the District's decision to dismantle the court-ordered desegregation plan. . . ." (Brief, p. 8)

449 U.S. 90, 104-105, 101 S.Ct. 411, 420-421, 66 L.Ed.2d 308 (1980) and **Boccardo v. Safeway Stores, Inc.**, 134 Cal. App. 1037, 184 Cal. Rptr. 903 (1982) (Brief, p. 14.) Petitioners therein suggest that the Supreme Court has adopted an applicable federal preclusion rule in **Allen v. McCurry**, supra, which was not followed by the court below when it extended claim preclusion only to 1969. The petitioners' argument, then, is that the court below erred in not extending the preclusion further, because it allegedly created and relied upon a **new** "Remedy Exception", not based in the California preclusion law. 3/ (Brief, p. 15.)

3/ Petitioners described the California "Remedy Exception" in terms that "California claim preclusion 'does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated.'" (Brief, p. 15) The reference is to part of the en banc opinion below at

As an alternative argument of the Certiorari Petition, petitioners assert that this case presents an appropriate occasion for this Court "to adopt the federal claim preclusion standards urged by the concurring opinion in **Migra.**" (Brief, p. 18.) The rule urged is one that would interpret 28 U.S.C. §1738 to permit federal preclusion on federal standards, even for circumstances in which a state court would not order such preclusion, thus closing the door only to the federal court, leaving the state

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3/ (cont.) page 739. (Petition, Appendix p. 13a). In support of this rule, The circuit court cited consistent and long-standing California authority, **Kettelle v. Kettelle**, 110 Cal. App. 310, 312 (1930), **Lord v. Garland**, 27 Cal.2d 840, 849 (1946); **Brown v. Brown**, 170 Cal. 1, 4 (1915); and **Metropolis Trust & Savings Bank v. Barnet**, 165 Cal. 449 (1913).

court as the only forum available. See, **Migra v. Warren City School District Board of Education**, __ U.S. __, 104 S.Ct. 892, 900 (1984) (concurring opinion of Justice White). Again, petitioners seek application of such a rule, for this case only, upon the consistently and baldly stated, uncritical assertion that federal law claims were actually litigated in the state court.

II

The Refusal of the Court Below To Extend Claim Preclusion Beyond 1969, Based On Long-standing California Doctrine and the Plain Facts That Federal Liability Issues Were Not Litigated Is Neither New Nor Erroneous In Application

Petitioners contend that the court below erred by creating and applying a new "Remedy Exception" to 28 U.S.C. §1738, because that court, after applying preclusion to all matters occur-

ring prior to 1969, which were deemed to have been raised in state court or which could have been raised, refused to extend that same preclusive effect to matters arising after 1969, which were deemed not raised by the pleadings or judgment in **Crawford.** In so doing, the circuit court explicitly refused to extend such primacy to the **Crawford** remand proceedings because the federal claims were not actually litigated and because those proceedings were concerned exclusively with questions of **remedy** under the state law and not with questions of liability and remedy under the federal constitution. (See, 750 F.2d at p. 740)

The petitioners maintain, in effect, that uncited passages in **Allen v. McCurry**, supra, and **Kremer v. Chemical Construction Corp.**, __ U.S. __, 102 S.Ct.

1883 (1982), in combination with dictum from **Boccardo v. Safeway**, supra, compel a rule that once the words "de jure segregation" were uttered by the **Crawford** plaintiffs, even in one reference, they were required to litigate all and any de jure segregation claims up to that point. 4/

Petitioners characterized the Circuit Court's stance as the new "Remedy Exception." There is nothing new about this rule of California preclusion law, as cited by the Circuit Court. The line

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4/ This Court in **Allen v. McCurry** specifically declined to intimate any view on the correctness of rejection of claim preclusion in federal court on federal issues which could have been raised in state court but were not. **Id.**, p. 97, fn. 10.

of cases supporting that view are consistent and long-standing. 5/ These authorities don't deal, merely, with a remedy exception, but state a basic limitation of the California claim preclusion law that restricts the reach of state judgments to the matters embraced. This is a California policy of long standing which restricts the broad ambit of preclusion of matters which could have, but were not litigated in the previous litigation. The old case authority cited is further supplemented by explicit statutory authority in California Code of

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5/ See footnote 3, infra, for citation of California cases relied upon by the court below.

Civil Procedure §1911, which reads:

> That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

As our Cross-Petition clearly indicates, because of its perceptual focus on the wrong final judgment in the state case, the court below seriously erred in its application of state claim preclusion rules, ignoring important limitations on preclusion, such as those relating to matters expressly reserved and not reached in the former litigation.

III

This Court Has Never Created Distinct Federal Preclusion Rules Which Override §1738's Requirements, Despite Several Recent Opportunities To Do So.

Allen v. McCurry, supra, is overread to have created a distinct federal rule of claim preclusion. This Court's holding was that there would be no "universal right to litigate a federal claim in a federal district court," for 42 U.S.C. §1983 cases, once the matter was "already decided" with finality in the state court. Id., pp. 104-105. In so holding, it appears that the Court was not intending to make any new federal rule of waiver, estoppel or election, but was supporting principles of comity for those state forums that provided essentially fair opportunities for the litigation of federal law claims, thus offering some form of protection to federal

rights. Id., at pp. 101, 104, 105.

Similarly, petitioners rely on no more than dictum in thier reference to **Boccardo v. Safeway**, supra. The issue in that case was whether a state claim was res judicata after dismissal resulting from a former federal action. The case discussion concerns itself primarily with construction of the primary rights doctrine and whether or how the Restatement rule re prior dismissal should be applied. That issue turned on the res judicata effect of federal dismissal of a pendent state claim.

Consideration of a separate state preclusion rule, requiring all or nothing presentation, was entertained by the court in dictum [" a better course might be . . . ."] This rule was not used in the decision and the Restatement rule was

applied to the case. The dictum in **Boccardo** has no force and effect on this case under 28 U.S.C. §1738.

Further, in our cross-petition, we pointed out that this Court has twice refused to adopt a distinct federal preclusion standard to override application of §1738 consideration. See, **Migra**, supra, and **Haring v. Prosise**, 462 U.S. 306, 103 S.Ct. 2368

IV

This Petition For Certiorari Conflicts With This Court's Policies In Ways Qualitatively Distinct From the Cross-Petition and Should Be Denied

The petition for certiorari is mere factual disagreement with the Circuit Court's view of the limited scope of the proceedings in Crawford, after remand from the decision of the California Supreme Court in **Crawford v. Board of**

Education, 17 Cal.3d 280 (1976) (**Crawford I**).

Ordinarily, this Court's policy is not to grant review where the petition, standing alone, is merely a challenge to state law determinations by the Court of Appeals. See, **Haring v. Prosise**, 2575, n. 8 (1983). We acknowledged this in our Cross-petition for Certiorari, at page 48, note 27, because we also challenged the Circuit Court's application of state preclusion law, based on its unreasonable, critically flawed factual and legal premises, drawn from the record of the **Crawford** litigation in the state court. The petitioners' challenge, here, differs, qualitatively, from our challenge, fundamentally, in that they accept the court's legal premises, but only dispute whether or not the court below has been consistent in its factual

findings that federal claims were not actually litigated during the state appeal and remedy proceedings from 1970 to 1981.

We posit our challenge on the positive, fundamental legal and factual ground that the only judgment in **Crawford**, to which preclusion could attach, is the 1970 Judgment and Writ of Mandate, as affirmed, which reserved major issues of federal liability and excluded any de jure liability findings whatsoever, especially those prior to 1963, as unecessary to the state court judgment.

If the legal effect of the **Crawford I** judgment for liability purposes, as opposed to its continued viability for remedial purposes, was not affected by the plebiscite, the dramatic

change in state law, and its subsequent implementation in **Crawford II**, as we maintain and has this Court has noted in **Crawford III**, the Circuit Court's reliance on such preclusive effect from **Crawford II** is unreasonable and clearly erroneous, requiring review only by this Court to vindicate the personal and present rights of the children. If the Circuit Court erred in limiting the preclusive reach of the **Crawford II** judgment, using the so-called "Remedy Exception," that is merely an incorrect construction of California law. Such an error imposes no prejudice to the school authorities even remotely similar to the grave and fundamental consequences of forfeiture of civil rights. Any such error could be subsequently corrected by this Court or the lower courts upon review of the fully developed record.

CONCLUSION

Based on the foregoing, the Petition For Certiorari should be denied on the issues submitted. Any review of the decision below should be under the issues presented in the Cross-Petition.

Respectfully submitted,

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